TITUS O. NASHOOKPUK, SR.

IBLA 87-87 Decided October 15, 1987

Appeal from decisions of the Fairbanks, Alaska, District Office, Bureau of Land Management, rejecting in part Native allotment application F-16931.

Motion to remand granted; motion to authorize a land survey denied.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Constitutional Law: Due Process -- Conveyances: Generally -- Patents of Public Lands: Effect -- Public Lands: Jurisdiction Over

   Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants -- Alaska National Interest Lands Conservation Act: Native Allotments -- Conveyances: Generally -- Hearings -- Patents of Public Lands: Effect -- Public Lands: Jurisdiction Over

   Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

3. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants -- Alaska Native Claims Settlement Act: Conveyances: Reconveyances -- Alaska Native Claims Settlement Act: Conveyances: Village Conveyances -- Patents of Public Lands: Effect -- Public Lands: Jurisdiction Over -- Surveys of Public Lands: Authority to Make

Surveys of privately owned lands may not be conducted by the Department at public expense.

APPEARANCES: Mark Regan, Esq., Barrow, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Titus O. Nashookpuk, Sr., appeals from a May 29, 1986, decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), rejecting his Native allotment application with respect to parcel A thereof. Nashookpuk has moved for remand of his appeal to BLM for an "Aguilar" proceeding, in conformity to the court's opinion in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and also requests a survey of part of lands withdrawn by Exec. Order No. 5391.

The BLM decision appealed from stated that Nashookpuk's application for three other parcels included in his allotment would be adjudicated at a later date. Parcel A was rejected because BLM found the land claimed by Nashookpuk had been reserved and set apart for the use by the Office of Education on July 8, 1930, by Exec. Order No. 5391. The decision stated that since that time the lands had been withdrawn and continued to be withdrawn until made available for selection by Tigara Corporation, which received the land by a conveyance dated January 17, 1977, pursuant to 43 U.S.C. § 1613(a)(1) (1982) (Interim Conveyance No. 50). Since appellant's use and occupancy commenced subsequent to the withdrawal, BLM found that the application was properly rejected.

Nashookpuk had filed his allotment application dated March 11, 1971, and filed a relinquishment of parcel A on September 18, 1974. In 1981, Nashookpuk requested the reinstatement of his Native allotment application. BLM reinstated many closed Native allotment applications at that time. As we stated in Heirs of Doreen Itta, 97 IBLA 261, 263 (1987), such action was prompted by the enactment on December 2, 1980, of section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1982), which provided for legislative approval of Native allotment applications which were pending before the Department of the Interior on or before December 18, 1971, under certain circumstances.

[1] Nevertheless, because the land had been previously conveyed to Tigara Corporation, ANILCA did not operate to legislatively approve Native

allotments on lands previously conveyed out of Federal ownership. Heirs of Doreen Itta, supra; Matilda Titus, 92 IBLA 340 (1986). Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership, as they are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment. Id. Because ANILCA did not confirm Native allotment applications for land previously conveyed out of Federal ownership, the statute has no direct bearing on the disposition of this appeal.

The interim conveyance, however, does not necessarily foreclose further action on appellant's application. In Titus, for example, the Board remanded the case for further action because a factual issue had been raised concerning the validity of Titus' relinquishment of her application, which in turn would affect the validity of any conveyance of the land subject to the Titus application. In Titus, there was a genuine issue of material fact concerning the authenticity of a relinquishment document which was found to be "suspect on its face." The factual issue concerning the authenticity of the document had to be resolved before the Department could decide, as a matter of law, whether the relinquishment was knowing or voluntary. The Board remanded the case to BLM for a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing.

[2] Although the Department may seek cancellation of a conveyance which includes lands described by a valid Native allotment application, see Matilda Titus, supra, a Native allotment applicant has no valid existing right to an allotment for conveyed land if the application was previously relinquished absent a showing that the relinquishment was either involuntary or unknowing. Heirs of Doreen Itta, supra.

In this appeal, appellant filed relinquishments for all four of the parcels for which he applied. A relinquishment for parcels B, C, and D was submitted on a type-written form letter addressed to Thomas Dean at BLM's Office in Fairbanks. Appellant's relinquishment of parcel A was submitted on an original type written letter which replicated verbatim the language of the form used for relinquishing the other three parcels:

> I had previously filed for a Native Allotment, serial number F-16931, partial [Parcel] A located at T. 34 N, R. 35 W., Sec. 14. After consulting with the Directors of Tigara Corporation. I find it to be my own interest to withdraw my application for the Native Allotment. Please consider my Native Allotment to be formally withdrawn as of 9-16-74 1974.

(Underlining in original; the underlined information was filled in by hand.) This relinquishment was dated September 17, 1974, and filed on September 18, 1974. No question has been raised concerning the authenticity of this document such as occurred in Matilda Titus, supra. The signature on the relinquishment appears to be the same as the signature on appellant's initial application. In his affidavit dated February 13, 1981, appellant states: "I may have relinquished (given up) my allotment." He further states: "If I really had had a choice, I would never have given up my Native allotment."

While there is no offer of proof made to show that this statement means Nashookpuk's relinquishment was involuntary, it seems fair to say it gives an indication of a desire to argue that the relinquishment was in fact not voluntary. The Board finds Nashookpuk has placed the matter in issue by this statement, and that the nature of his relinquishment has now been challenged on appeal. An Aguilar proceeding may therefore properly be conducted by BLM.

But, while it appears an Aguilar proceeding is proper, it is by no means clear that a survey would be proper or necessary although the parties have agreed in the stipulation for remand that BLM will conduct a survey to determine whether Nashookpuk's allotment was located within the boundary of the withdrawal created by Exec. Order No. 5391. It now appears that the location of the withdrawal may be uncertain in the area of the Nashookpuk allotment. The authority of the Secretary of the Interior to conduct surveys of the public lands is derived from United States statutes. Mr. & Mrs. John Koopman, 70 IBLA 75 (1983). Since this land has been conveyed to Tigara, the proposed surveys would occur entirely on land to which the United States holds no legal title. This fact raises two distinct obstacles to approval of the stipulation dealing with a proposed survey. Neither BLM nor appellant has established that the surface owner has consented to an entry upon its land for this purpose. Nor is it clear that such a right was reserved to the United States. Such a showing would be necessary before the provision of the stipulation requiring a survey could be accepted. Absent a showing that a survey as proposed is authorized by law, it may not be ordered.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to remand this appeal for Aguilar proceedings is granted. The motion to authorize a land survey is denied.

Franklin D. Arness
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

James L. Burski
Administrative Judge